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10 Attorneys for Non-Party Nintendo of America Inc.

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13
14 FEDERAL TRADE COMMISSION
15 Plaintiff,
16 v.
17 MICROSOFT CORPORATION,
18 and
19 ACTIVISION BLIZZARD, INC.,
20 Defendants.
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Case No. 23-cv-02880-JSC

**NON-PARTY NINTENDO OF AMERICA
INC. MOTION FOR A PROTECTIVE
ORDER RE DKT. NO. 175 (PLAINTIFF'S
PROPOSED PRETRIAL FINDINGS OF
FACT AND CONCLUSIONS OF LAW)**

1 Pursuant to Fed. R. Civ. P. 26(c), Non-Party Nintendo of America Inc. (“NOA”) hereby
 2 moves for a protective order regarding its confidential information contained in Plaintiff’s
 3 Federal Trade Commission (“FTC”) Proposed Pretrial Findings of Fact and Conclusions of Law
 4 (Dkt. No. 175).

5 **I. INTRODUCTION**

6 On June 22, 2023, Plaintiff filed its Proposed Pretrial Findings of Fact and Conclusions
 7 of Law. (Dkt. No. 175). As of the time of this filing, Plaintiff has failed to file the required
 8 motion under Civil L.R. 79-5(f), an Administrative Motion to Consider Whether Another Party’s
 9 Material Should Be Sealed. On June 27, 2023, counsel for NOA inquired whether Plaintiff
 10 intended to make such a filing or at minimum provide NOA with the requisite notice. At this
 11 time, Plaintiff has neither made the required filing pursuant to Civil L.R. 79-5(f) or informed
 12 NOA which portions of their Proposed Pretrial Findings of Fact and Conclusions of Law
 13 included Nintendo’s confidential information produced during the course of discovery in *In the*
 14 *Matter of Microsoft Corp. and Activision Blizzard, Inc.*, before the FTC Office of Administrative
 15 Law Judges, Docket No. 9412. Therefore, NOA is unable to file its Statement designating its
 16 confidential information to remain under seal because it does not know what information of
 17 NOA’s Plaintiff has incorporated into its Proposed Pretrial Findings of Fact and Conclusions of
 18 Law.

19 **II. ARGUMENT**

20 Under Fed. R. Civ. P. 26(c), the court may, for good cause, issue an order to protect a
 21 party or person from annoyance, embarrassment, oppression, or undue burden or expense. A
 22 good cause analysis under Rule 26(c) entails a balancing of the needs for discovery against the
 23 need for confidentiality. *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 205 (N.D. Cal.
 24 2009). Courts have broad latitude under the law to tailor protective orders to prevent disclosure
 25 of materials for many types of information, including, but not limited to, trade secrets or other
 26 confidential research, development, or commercial information. *Id.* at 201.

27 Good cause exists here. Under Civil L.R. 79-5(f), “[f]or any document a party (“Filing
 28

1 Party") seeks to seal because that document has been designated as confidential by another party
 2 or non-party (the "Designating Party"), the Filing Party must, instead of filing an Administrative
 3 Motion to File Under Seal, file an Administrative Motion to Consider Whether Another Party's
 4 Material Should Be Sealed." (emphasis added). Due to Plaintiff's failure to provide the required
 5 notice, NOA objects to the disclosure of any of NOA's confidential information contained in
 6 Plaintiff's Proposed Pretrial Findings of Fact and Conclusions of Law. To date, NOA has
 7 dutifully filed its Civil L.R. 79-5 Statements when given the requisite notice. See Dkt. Nos. 168,
 8 219, 220, 221, 238, 239. Alternatively, NOA requests that such information be provisionally
 9 sealed until NOA may confer with Plaintiff to obtain the necessary information in order to file its
 10 Civil L.R. 79-5 Statement.

11 **III. CONCLUSION**

12 For the foregoing reasons, Non-Party NOA respectfully request the Court to keep sealed
 13 the entirety of NOA's confidential information contained in Plaintiff's FTC Proposed Pretrial
 14 Findings of Fact and Conclusions of Law (Dkt. No. 175) and for that information to remain
 15 redacted on the Court's public docket. Alternatively, NOA requests that such information be
 16 provisionally sealed until NOA may confer with Plaintiff to obtain the necessary information in
 17 order to file its Civil L.R. 79-5 Statement.

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 19 Dated: June 29, 2023

VENABLE LLP

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 21 By: _____ /s/ Steven E. Swaney
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 24 Benjamin P. Argyle (pro hac vice)
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 26 America Inc.
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